

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN L. HOPKINS,	)	No. C 12-0415 LHK (PR)
	)	
Petitioner,	)	ORDER GRANTING MOTION FOR
	)	LEAVE TO PROCEED IN FORMA
vs.	)	PAUPERIS; ORDER OF DISMISSAL
	)	WITH LEAVE TO AMEND
	)	
CONTRA COSTA COUNTY SHERIFF	)	
DEPARTMENT and DAVID O.	)	
LIVINGSTON,	)	
	)	(Docket No. 2)
Respondents.	)	
_____	)	

Petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the grievance procedures at the Contra Costa County Jail. Petitioner's motion for leave to proceed in forma pauperis is GRANTED. For the reasons stated below, the Court dismisses the petition with leave to amend.

### DISCUSSION

#### A. Standard of Review

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order

1 directing the respondent to show cause why the writ should not be granted, unless it appears  
 2 from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. §  
 3 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or  
 4 conclusory, palpably incredible, or patently frivolous or false. *See Hendricks v. Vasquez*, 908  
 5 F.2d 490, 491 (9th Cir. 1990) (quoting *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977)).

6 B. Petitioner’s Claim

7 Petitioner alleges that he is being denied access to the courts because the grievance  
 8 procedures at Contra Costa County Jail are flawed. Petitioner’s claim is not cognizable in  
 9 federal habeas corpus. “Federal law opens two main avenues to relief on complaints related to  
 10 imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil  
 11 Rights Act of 1871, Rev. Stat. § 1979, *as amended*, 42 U.S.C. § 1983. Challenges to the  
 12 lawfulness of confinement or to particulars affecting its duration are the province of habeas  
 13 corpus.” *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (internal quotation marks and citation  
 14 omitted). “An inmate’s challenge to the circumstances of his confinement, however, may be  
 15 brought under § 1983.” *Id.* While the Supreme Court has not addressed whether a challenge to a  
 16 condition of confinement may be brought in habeas corpus, *see Docken v. Chase*, 393 F.3d 1024,  
 17 1028 (9th Cir. 2004), the Ninth Circuit has held that “habeas jurisdiction is absent, and a § 1983  
 18 action proper, where a successful challenge to a prison condition will not necessarily shorten the  
 19 prisoner’s sentence.” *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003). Thus, where, as  
 20 here, a petitioner’s successful challenge to the county jail’s administrative appeal procedures will  
 21 not necessarily shorten the prisoner’s sentence, habeas jurisdiction does not lie. *See id.*  
 22 Accordingly, Petitioner may not proceed with his claims by way of federal habeas corpus, and  
 23 the petition is DISMISSED.

24 Where a prisoner files a habeas petition attacking the conditions of his confinement the  
 25 district court may construe such petition as a civil rights action under 42 U.S.C. § 1983. *See*  
 26 *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971). The Court will not do so here, however,  
 27 unless Petitioner affirmatively informs the Court that he wants this case to proceed as a civil  
 28 rights action. Specifically, because § 1983 cases filed by prisoners are subject to certain

1 statutory requirements of which Petitioner should be aware before deciding to proceed with a §  
 2 1983 action, the Court will not construe the petition as a § 1983 action without Petitioner's  
 3 consent. In particular, § 1983 cases filed by prisoners are subject to a requirement that the  
 4 claims be administratively exhausted. *See* 42 U.S.C. § 1997e(a). Further, such cases are subject  
 5 to a \$350.00 filing fee, rather than the \$5.00 dollar filing fee for habeas cases, *see* 28 U.S.C.  
 6 § 1914(a), and the fee must be paid even if in forma pauperis status is granted, by way of  
 7 deductions from the prisoner's trust account until the full \$350.00 fee is paid. *See* 28 U.S.C.  
 8 § 1915(b). Finally, Petitioner is advised that there is no constitutional right to a prison  
 9 administrative appeal or grievance system. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir.  
 10 2003). For these reasons, Petitioner might not seek to have the instant action treated as a § 1983  
 11 case.

12 Accordingly, this case is DISMISSED with leave to amend to allege a § 1983 action.  
 13 Should Petitioner fail to do so, the case will be dismissed without prejudice.

#### 14 CONCLUSION

15 For the foregoing reasons, Petitioner's case is DISMISSED with leave to amend.  
 16 Petitioner must file his complaint no later than **thirty (30) days** from the date of this order.  
 17 Petitioner must write the case number for this action -- Case No. C 12-0415 LHK (PR) -- on the  
 18 form and complete all sections of the form. Petitioner is particularly directed to name as  
 19 Defendants each person who caused a violation of his constitutional rights and explain what each  
 20 person did to cause the violation. Liability under § 1983 arises only upon a showing of personal  
 21 participation by the Defendant. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

22 As mentioned above, the filing fee for a civil rights action is \$350.00. Petitioner must  
 23 pay the \$350.00 filing fee, or file another application for leave to proceed in forma pauperis,  
 24 before this action can proceed. Accordingly, if Petitioner chooses to file a civil rights complaint,  
 25 petitioner must pay the requisite \$350.00 filing fee in this action no later than **thirty (30) days**  
 26 from the date of this order. He shall include with his payment, a clear indication that it is for the  
 27 above-referenced case number, Case No. C 12-0415 LHK (PR). Alternatively, in the event that  
 28 Petitioner is unable to pay the filing fee, he shall submit an in forma pauperis application, trust

1 account statement and certificate of funds no later than **thirty (30) days** from the date of this  
2 order.

3 **Failure to file a completed civil rights form and to pay the filing fee or file the**  
4 **requisite documents within the thirty-day deadline shall result in dismissal of this action**  
5 **without prejudice.**

6 IT IS SO ORDERED.

7 DATED: 4/30/12

  
LUCY H. KOH  
United States District Judge